

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DANIELLE M. GIZAS, )  
Plaintiff, ) CASE NO. C12-0893-RSM-MAT  
v. )  
MICHAEL J. ASTRUE, ) REPORT AND RECOMMENDATION  
Commissioner of Social Security, ) RE: SOCIAL SECURITY  
Defendant. ) DISABILITY APPEAL  
\_\_\_\_\_  
)

14 Plaintiff Danielle M. Gizas proceeds through counsel in her appeal of a final decision  
15 of the Commissioner of the Social Security Administration (Commissioner). The  
16 Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a  
17 hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision,  
18 the administrative record (AR), and all memoranda of record, the Court recommends that this  
19 matter be REVERSED and REMANDED for further administrative proceedings.

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## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1993.<sup>1</sup> At the time of the administrative hearing, Plaintiff was enrolled in eleventh grade via online classes. (AR 36-38.)

On April 3, 2008, Plaintiff's mother filed an application for SSI benefits on Plaintiff's behalf. (See AR 135-43.) Those applications were denied initially and on reconsideration, and Plaintiff timely requested a hearing. (AR 78-80, 87-96.)

On July 28, 2010, ALJ Verrell Dethloff held a hearing, taking testimony from Plaintiff, Plaintiff's mother, and a medical expert. (AR 33-68.) On December 1, 2010, the ALJ issued a decision finding Plaintiff not disabled. (AR 14-28.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on March 22, 2012 (AR 1-6), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

## **JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## **DISCUSSION**

The social security regulations set forth a three-step sequential evaluation process for determining whether a child is disabled. 20 C.F.R. § 416.924. At step one, it must be

<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 determined whether the claimant is performing substantial gainful activity.<sup>2</sup> *Id.* The ALJ  
02 found that Plaintiff had not engaged in substantial gainful activity since March 18, 2008, her  
03 benefits application date. (AR 17.)

04 If the claimant is not performing substantial gainful activity, at step two, it must be  
05 determined whether the claimant has a “severe” medically determinable impairment or  
06 combination thereof. *Id.* The ALJ found that Plaintiff had two severe impairments: a mood  
07 disorder and oppositional defiant disorder (ODD). (AR 17.)

If the claimant has a severe impairment or combination of impairments that meets the duration requirement, it must be determined at step three whether that impairment meets, medically equals, or functionally equals a listed impairment in 20 C.F.R. § 404, Part B, Appendix 1, Subpart P. *Id.* If the child's impairment meets or medically equals a listed impairment, then the claimant will be found disabled. If the impairment does not meet or medically equal a listed impairment, it must be determined whether the impairment *functionally* equals a listed impairment by assessing the child's limitations in six broad areas of functioning called "domains." The domains include the following: (1) acquiring and using information, (2) attending and completing tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for oneself, (6) health and physical well-being. 20 C.F.R. § 416.926a. The claimant's impairment will be considered functionally equivalent if the claimant has "marked" limitations in two domains, or "extreme" limitations in one domain. *Id.* A determination of functional equivalence is the responsibility of the state

<sup>2</sup> School attendance is not considered substantial gainful activity. 20 C.F.R. § 416.972.

01 agency medical or psychological staff at the initial and reconsideration levels, of an ALJ at  
02 the hearing level, and of the Appeals Council at that level. 20 C.F.R. § 416.926a(n).

03 If a claimant survives all three steps and has an impairment that meets, medically  
04 equals, or functionally equals a listed impairment for the required duration, he or she will be  
05 found disabled for purposes of SSI. Here, the ALJ found that Plaintiff did not have an  
06 impairment or combination of impairments that met or medically equaled a listed impairment,  
07 and also found that Plaintiff's impairments (individually or in combination) were not  
08 functionally equal to a listed impairment. (AR at 17-27.)

09 This Court's review of the ALJ's decision is limited to whether the decision is in  
10 accordance with the law and the findings supported by substantial evidence in the record as a  
11 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
12 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
13 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
14 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
15 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
16 F.3d 947, 954 (9th Cir. 2002).

17 Plaintiff argues the ALJ erred by (1) finding Plaintiff's limitation in attending and  
18 completing tasks to be less than marked and attributable to volitional conduct rather than a  
19 medical impairment; and (2) failing to consider whether Plaintiff's impairments met or  
20 medically equaled a listed impairment under the child's listings (rather than the adult listings).  
21 The Commissioner argues that the ALJ's decision should be affirmed because it is supported  
22 by substantial evidence and free from legal error.

## Functional Equivalence

02 The ALJ found that Plaintiff was markedly limited in only one of the six domains:  
03 interacting and relating with others. (AR 25.) Plaintiff argues that the ALJ should have also  
04 found her to be markedly limited in the domain of attending and completing tasks, as she  
05 contends medical expert found.

At the administrative hearing, the medical expert testified that he believed Plaintiff had a marked limitation in her ability to attend and complete tasks “when she was asked to follow through, follow through with school” (AR 62), but also testified that he believed her limitations in this domain were “less than marked.” (AR 59.) The ALJ sought clarification of this equivocal testimony as to this domain later in the hearing:

11 [ALJ]: I'm a little confused about your rating of the claimant on attending and completing tasks.

12 [Medical expert]: Again, and it's difficult, Your Honor, because if it is a task  
13 that she wants to do and likes she will complete it but if she doesn't want to do  
14 it and there's a certain kind of an issue here — It's hard to say if it is conscious  
or unconscious at this point. That's how I rated it. That's one of the issues I  
was trying to deal with. Sorry to split hairs.

16 [ALJ]: That's all right. So, we don't really know if it is subconscious or merely motivational?

17 [Medical expert]: We don't. That's one of the problems. She certainly has had  
18 severe behavioral problems. There's no question about that. Her recent  
19 treatment has been successful, at least on paper, they say it's been successful  
20 because they did this intervention with this Ayers Company. But I don't get  
any sense of her moving beyond this kind of vegetative life that she's leading  
right now and I think if she continues this life — There's no major therapeutic  
breakthrough that I can see.

21 || [ALJ]: It's sort of like she's retired.

[Medical expert]: Yes. And it would be hard to imagine a 17-year-old young

01 woman with normal intelligence, not being to at least function better. And  
02 Counsel made a good point, that her school record is abysmal and her  
03 performance, she's really been difficult at school. She's used a lot of profanity  
04 [and] so she may indeed have a bi-polar I but so far there hasn't been any real  
05 good — It's a rare disease and it's a difficult disease to evaluate in young  
06 people and even more difficult to treat. So, she may have some kind of low  
07 grade bi-polar disorder which has not been successfully treated. The substance  
abuse could be comorbid with it. But at her current state I don't see very much  
progress forward or backward. I don't see any resolution of her conflict.  
Unless there is some further evaluation, perhaps evaluation by somebody who  
is very experienced in affective disorders in adolescents. I've seen about  
twelve through my lifetime and treated them and it's been difficult. They are  
really hard people to treat.

08 [ALJ]: Thank you.

09 [Plaintiff's attorney]: Doctor, you'd mention she does what she wants to do but  
10 doesn't do what she doesn't want to do. Is that a symptom of oppositional  
defiant disorder?

11 [Medical expert]: Well, you know I have my concerns about oppositional  
12 defiant disorder but it could be certainly behavioral — It could be as they  
define it, yes.

13 [Plaintiff's attorney]: In the DSM4?

14 [Medical expert]: Yes.

15 (AR at 65-67.) In his written decision, the ALJ described the medical expert's testimony as  
16 "somewhat equivocal" but suggesting that Plaintiff had "less than marked limitations in  
17 attending and completing tasks." (AR 21.) The ALJ found that the evidence "suggests that  
18 [Plaintiff] is able to attend and complete tasks when she chooses to do so." (AR 20.) To  
19 support that finding, he cited (1) Plaintiff's refusal to participate in counseling that was  
20 strongly encouraged; (2) her discontinuation of her ADHD medication due to side effects; (3)  
21 her subsequent diagnosis with bipolar disorder; (4) her failure to display hyperactivity or  
22 excessive fidgeting, her logical and organized thoughts, and her lack of impulsivity or

01 distractibility during a July 2008 psychological exam, after which the examiner diagnosed  
 02 Plaintiff with bipolar disorder (not ADHD) and ODD and found that her concentration,  
 03 persistence and pace were not markedly atypical. (AR 20.) Elsewhere in the decision, the  
 04 ALJ cited Plaintiff's ninth-grade math teacher's evaluation and concluded that Plaintiff's  
 05 "academic failure is within her own control." (AR 24.)

06 Plaintiff assigns error to the ALJ's minimization of Plaintiff's difficulties with  
 07 attending and completing tasks as simply "volitional behavior." Plaintiff notes that symptoms  
 08 of ODD include "'actively defying or refusing to comply with the requests or rules of adults'"  
 09 and "'resistance to directions.'" *See* Dkt. 14 at 7 (quoting Diagnostic and Statistical Manual  
 10 of Mental Disorders 318.81 (4th ed. 2000)). Thus, according to Plaintiff, it is unclear on what  
 11 basis the ALJ concluded that Plaintiff's failure to complete school assignments was "within  
 12 her own control," given that he acknowledged that her ODD was a severe impairment.

13 The Court agrees that the ALJ failed to cite evidence that supports an inference that  
 14 Plaintiff's failure to complete school assignments is "within her control." Plaintiff's refusal to  
 15 take medication and participate in counseling do not demonstrate that she volitionally controls  
 16 her behavior, and her bipolar diagnosis is not inconsistent with difficulties attending and  
 17 completing tasks. The July 2008 psychological evaluation also fails to support the ALJ's  
 18 conclusion. Nancy Heilman, Ph.D., diagnosed Plaintiff with ODD and found some "ADHD  
 19 symptomatology present," which she believed was attributable to Plaintiff's bipolar disorder  
 20 rather than ADHD itself. (AR 287.) Dr. Heilman recommended that Plaintiff continue  
 21 bipolar treatment and start therapy or counseling. (AR 288.) Ultimately, Dr. Heilman  
 22 believed Plaintiff would require "increase[d] supervision and special services for the

01 foreseeable future." (AR 288.) Dr. Heilman's evaluation does not include an opinion that  
02 Plaintiff's impairments are not the cause of her failure to complete schoolwork, and thus does  
03 not support the ALJ's conclusion that Plaintiff's "academic failure is within her own control."

04 Though the ALJ accurately noted that Plaintiff's ninth-grade math teacher indicated  
05 that she had no limitation as to focusing long enough to finish a task, refocusing to task,  
06 carrying out instructions, or organizing school materials, the ALJ failed to acknowledge that  
07 the teacher also noted on the same page that Plaintiff had a "serious problem" completing  
08 class assignments and an "obvious problem" completing work accurately without careless  
09 mistakes, working without distracting herself or others, and completing assignments on time.  
10 (AR 166.) The teacher's evaluation as a whole does not support the ALJ's conclusion.

11 Furthermore, Plaintiff's more recent school evaluations confirm that she continued to  
12 have difficulties attending and completing tasks. In tenth grade, Plaintiff's study skills  
13 teacher found more severe limitations than her ninth-grade math teacher found: she was found  
14 to have serious problems completing assignments, changing activities without disruption,  
15 focusing long enough to finish assignments, refocusing to task when necessary, and carrying  
16 out multistep instructions, and obvious problems working at a reasonable pace/finishing on  
17 time, working without distracting others, completing work accurately without careless  
18 mistakes. (AR 225.)

19 In eleventh grade, Plaintiff continued to have trouble at school. Her teachers noted  
20 that she

21 completes very little work in her classes and failed all of her classes last school  
22 year. She often refuses work and chooses to read or listen to music instead. In  
observations completed both at school and off-campus during tutoring it has

01       been noted that Danielle has difficulties following rules, often engages in  
 02       preferred activities rather than assigned tasks, and lacks appropriate social and  
 03       behavioral skills to deal with conflict and frustration. . . .

04       Based on observations, interviews, behavioral assessments, and a  
 05       review of her disciplinary records it appears that Danielle does not possess the  
 06       necessary self-regulation skills to be successful. As a result she will need  
 07       specially designed instruction to explicitly teach her conflict resolution skills,  
 08       and to increase her compliance to adult requests. In addition, she will need  
 09       significant accommodations and modifications to her educational environment.

10       . . .

11       (AR 370.) Plaintiff also submitted more recent evidence to the Appeals Council, showing that  
 12       Plaintiff's one-on-one home tutoring program had not been successful because Plaintiff  
 13       refused to participate more than sporadically because she disliked her tutor. (AR 254.)  
 14       Plaintiff instead switched to a one-on-one drop-in program, but only attended three out of five  
 15       days per week on average. (AR 254.) Teachers "continue to note that [Plaintiff] engages in  
 16       disrespectful and oppositional behavior." (AR 270.)

17       In light of all of this evidence of record, the ALJ's findings regarding Plaintiff's  
 18       abilities to attend and complete tasks are inadequate, because the reasoning provided fails to  
 19       account for most of the evidence and the reasons provided for rating her limitations as "less  
 20       than marked" do not actually support the ALJ's conclusion that she has the ability to attend  
 21       and complete tasks when she chooses to do so. Instead, the evidence shows that Plaintiff  
 22       consistently refuses to complete assigned schoolwork, requires consistent prompting to stay  
 23       on task, cannot manage her time to complete tasks within the time allotted, and is easily  
 24       frustrated, which is consistent with her ODD diagnosis. *See, e.g.*, AR 254. Her teachers  
 25       affirmed that Plaintiff's multiple mental health diagnoses "adversely impact her educational  
 26       success by limiting her alertness and focus, impacting her ability to attend school, and by

01 causing social and behavioral differences.” (AR 275.) Though the ALJ apparently believes  
 02 that her conduct is volitional, he did not cite any evidence to support this belief. Further, even  
 03 if Plaintiff can complete self-selected tasks, as the ALJ believes, the “attending and  
 04 completing tasks” domain for adolescents focuses on assigned tasks in a school setting, not  
 05 self-selected tasks. *See, e.g.* 20 C.F.R. § 416.926a(h)(2)-(3).

06 Accordingly, on remand the ALJ shall reconsider the severity of Plaintiff’s limitation  
 07 in the domain of attending and completing tasks as defined by the regulations, in light of all  
 08 the evidence of record. If necessary, the ALJ shall obtain additional medical expert  
 09 testimony.

10 Childhood Listings

11 The ALJ’s decision relies upon the medical expert’s testimony that Plaintiff’s  
 12 impairments do not meet or medically equal any of the listed impairments for children. (AR  
 13 17.) According to Plaintiff, the medical expert presented inconsistent testimony regarding the  
 14 childhood listings, but various aspects of his testimony suggest that Plaintiff did meet a  
 15 childhood listing.

16 Reviewing the transcript of the administrative hearing sheds some light on this  
 17 dispute. The medical expert never directly testified as to whether Plaintiff met a childhood  
 18 listing, though some of his testimony suggests that she did:

19 [ALJ]: How would you rate her on the form we have? . . . We have a  
 20 specialized form for people under 18.

21 [Medical expert]: . . . Let me go through the first one. Acquiring and using  
 22 information, she has no limitation with that. She has less than marked  
 problems with attending and completing a task. Interacting with others, I think  
 at times can be marked and that’s been proven, I think the interaction is

01 basically with her mother. . . . [B]asically, I was trying to evaluate her under  
02 the adult evaluation since they were alleging bi-polar disorder and that was the  
03 one I was sort of fitting her in to. She doesn't really fit that very well. She's  
04 probably, as far as the child, the only thing that really comes up is the difficulty  
05 in not completing tasks when she is asked to do this and interacting with  
others. So, she might meet the child. But it's a little bit hard to say under  
certain circumstances right now when she's getting pretty much what she  
wants to do, she does all right and the only person she is conflicting with is her  
mother. She pretty much does what she wants to do otherwise.

06 . . .

07 [Plaintiff's attorney]: Doctor, are you familiar with the childhood criteria for  
08 evaluating disability?

09 [Medical expert]: Yes.

10 [Plaintiff's attorney]: Okay. And so you do realize the bi-polar disorder can be  
evaluated under the child standard, as well. Is that correct?

11 [Medical expert]: Yes, it could be, yes.

12 [Plaintiff's attorney]: Okay. You didn't mention a diagnosis that comes up  
multiple times which is oppositional defiant disorder.

13 [Medical expert]: Yeah. That's a popular diagnosis.

14 [Plaintiff's attorney]: Okay. When you say it's a popular diagnosis –

15 [Medical expert]: It's a diagnosis that is done sort of as – from a scientific  
background for it, but it is an issue that's quoted in children that would have  
probably personality disorders, yes.

16 [Plaintiff's attorney]: Okay. And it's also listed in the DSM4.

17 [Medical expert]: Yes.

18 [Plaintiff's attorney]: It's generally recognized as a real and valid diagnosis?

19 [Medical expert]: Yes.

20 [Plaintiff's attorney]: Okay. And do you see evidence that [Plaintiff] has this?

01 [Medical expert]: They've diagnosed her with an ODD, Oppositional  
02 diagnosis.

03 [Plaintiff's attorney]: Okay.

04 [Medical expert]: I think the issue is – And that's probably a fair diagnosis.  
05 The child listing that I said – My take on her would be that she would meet  
06 part of the child listings.

07 [Plaintiff's attorney]: Okay. When you say she would meet part of the child  
08 listings, you're saying that she has a marked limitation in interacting and  
09 relating with others?

10 [Medical expert]: Right.

11 [Plaintiff's attorney]: And a marked limitation in what other domain, attending  
12 and completing?

13 [Medical expert]: The other domain I believe was her ability to attending and  
14 completing tasks when she was asked to follow through, follow through with  
15 school, and that was marked.

16 [Plaintiff's attorney]: I want to ask you some more questions about that. Did  
17 you review the teacher questionnaire at 5E2?

18 [Medical expert]: Yeah. I did.

19 [Plaintiff's attorney]: Okay. And so, is that part of the basis of your finding  
20 that she has a marked difficulty in attending and completing tasks?

21 [Medical expert]: Yes.

22 (AR 60-63.) Neither this testimony nor any other portion of the hearing transcript contains  
23 the discussion of childhood listings the ALJ describes in the written decision.

24 Nonetheless, Plaintiff has not presented any evidence showing that her impairments  
25 were in fact medically equivalent to a childhood listing. *See* 20 C.F.R. Part 404, Subpart P,  
26 Appendix 1, 112.02B.2 (setting forth the criteria for the childhood listings for mood disorders  
27 and personality disorders). Though Plaintiff faults the ALJ for focusing on functional

01 equivalence rather than medical equivalence (Dkt. 14 at 19), Plaintiff's evidence displays the  
02 same focus. For example, Plaintiff's briefing does not identify which of the Part B  
03 requirements of Listing 112.02(B)(2) she meets or equals, but simply contends that "the  
04 evidence" supports a finding that she met or equaled those requirements. *See* Dkt. 14 at 19-  
05 20. Accordingly, because Plaintiff has not shown that the ALJ erred in finding that she did  
06 not medically equal a childhood listing, Plaintiff's argument fails on this point.

07 **CONCLUSION**

08 For the reasons set forth above, this matter should be REVERSED and REMANDED  
09 for further administrative proceedings.

10 DATED this 10th day of January, 2013.

11  
12   
13 Mary Alice Theiler  
14 United States Magistrate Judge  
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